Supreme Court, U. S.
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In The

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-817

DONALD L. BRISENDINE and JOHN BASS,
Petitioners,

v.

NATIONAL MOVIE-DINE, INC., et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

H. C. McCRACKEN
McCRACKEN, SHIELDS & TAYLOR
A Professional Corporation
Dallas County State Bk. Bldg.
Carrollton, Texas 75006
Attorneys for Petitioners.

SOUTHWESTERN LAW PRESS – DALLAS, TEXAS 75208 – (214) 742-3995

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In The

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OCTOBER TERM, 1977

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DONALD L. BRISENDINE and JOHN BASS,
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v.

NATIONAL MOVIE-DINE, INC., et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

A Writ of Certiorari is respectfully sought to review the Court of Appeal's Order dismissing the appeal of the Petitioners.

OPINIONS BELOW

Fifth Circuit. The opinion of the Court below in this case was unreported. The Order dismissing the appeal is in the record.

District Court. The opinion of the District Court for the Northern District of Texas was unreported. Its Orders staying proceedings pending arbitration are set forth in the record.

District Court. The opinion of the District Court of the Southern District of New York was unreported. These Orders compelling arbitration are set forth in the record.

JURISDICTION

The order of the Court of Appeals was entered September 1, 1977. This Petition for Certiorari was filed less than 90 days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

Did the Court of Appeals err in dismissing the appeal in view of the following questions of law presented to the District Court?

1. Did the District Court err in staying all proceedings pending arbitration without regard to the Substantive Law of the State of Texas, the Texas Deceptive Trade Practices—Consumer Act, which contains a "no waiver" clause, and in so doing deprived Petitioners of their rights as citizens of a sovereign state?

2. Did the District Court's action of staying all proceedings pending arbitration deprive Petitioners of their constitutional rights as citizens of the United States by depriving them of the protection afforded by a Texas Statute concerning an area of commerce not preempted by Congress?

CONSTITUTIONAL PROVISIONS INVOLVED

The Tenth Amendment to the Constitution of the United States provides in pertinent part as follows:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

STATUTORY PROVISIONS INVOLVED

The Deceptive Trade Practices-Consumer Protection Act, Texas Business and Commerce Code Annotated, Section 17.42, states the waiver policy of its law:

> "Any waiver by a consumer of the provisions of this subchapter is contrary to public policy and is unenforceable and void."

Section 17.44 of the Statute states its construction and application and purpose:

> "This subchapter shall be liberally construed and applied to promote its underlying purposes, which are to protect consumers against false, misleading, and deceptive business practices, unconscionable actions, and breaches of warranty and to provide efficient and economical procedures to secure such protection."

Section 17.46 describes Deceptive Trade Practices as the following:

> (a) False, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.
>
> (b) The term "false, misleading, or deceptive

acts or practices" includes but is not limited to, the following acts:

* * *

(2) causing confusion or misunderstanding as to the source, sponsorship, approval, or certification of goods or services;

(3) causing confusion or misunderstanding as to affiliation, connection, or association with, or certification by, another;

(4) using deceptive representations or designations of geographic origin in connection with goods or services;

(5) representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or qualities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which he does not;

* * *

(9) advertising goods or services with intent not to sell them as advertised;

(10) advertising goods or services with intent not to supply a reasonable expectable public demand, unless the advertisements disclosed a limitation of quantity;

* * *

STATEMENT OF THE CASE

This is a diversity action wherein Petitioners, DONALD L. BRISENDINE and JOHN BASS, residents and citizens of the State of Texas, brought suit against Respondents, NATIONAL MOVIE-DINE, INC. and CREATIVE CINE-TEL, INC., foreign corporations, and ERNEST BOGEN, LAWRENCE H.

FORRAY, CHARLES BOASBERG, HARVEY SCHLAGS, HERMAN RAUCHER, ROBERT S. COHEN ROBERT MOFFITT, and RALPH ROSS, residents and citizens of states other than the State of Texas. The District Court had jurisdiction under 28 U.S.C.A. Sec. 1332 as the matter in controversy was greater than $10,000.00 and was between citizens of different states.

Petitioners allege that during March and April of 1976 all Respondents engaged in business in the State of Texas by and through their agents and employees; such business activities consisting of advertising, interviewing, and entering into Distributor Licensing Agreements with Petitioners, such Distributor Licensing Agreements providing Petitioners with the exclusive right to exhibit motion pictures in certain restaurants in the Dallas-Fort Worth area and Houston-Beaumont area of the state of Texas. As a result of such activities, Petitioners entered into an agreement with NATIONAL MOVIE-DINE, INC. and, as a consideration, paid Twenty Thousand Dollars ($20,000.00) each for such licensing agreement. Each Distributor Licensing Agreement contained a provision relating to arbitration as follows:

> "17. Governing Law, Arbitration. "The provisions of the Agreement shall be governed by and construed in accordance with the laws of the State of New York. It is hereby agreed that any question, dispute, or controversy arising out of, in connection with, or in relation to this Agreement or its interpretation, performance or nonperformance of any breach thereof, shall be subject to the jurisdiction of the Supreme Court of the State of New York, in and for the County of New York;

and both parties hereto expressly consent to the jurisdiction of said Court.

"Any controversy, dispute or question arising out of any aspect of the Agreement, including the making thereof, shall be resolved by arbitration in accordance with the then existing rules of the American Arbitration Association conducted in New York, New York, and any judgment or any award (which may, subject to the terms hereof, include an award of damages or equitable relief) may be entered in any State or Federal Court having jurisdiction."

Petitioners subsequently filed suit in the United States District Court for the Northern District of Texas by which Petitioners contended that Respondents willfully, fraudulently, and deliberately withheld and misrepresented certain circumstances concerning the activities, obligations, and background of NATIONAL MOVIE-DINE, INC., and further knew that, if the facts were known, Petitioners would not have entered into a Distributor Licensing Agreement.

Petitioners alleged that Respondents are guilty of violation of the Deceptive Trade Practices-Consumer Protection Act, Sections 17.41-17.63 (Supp. 1976), and, as a result, Respondents are jointly and severally liable for three times the amount of actual damages in this cause as set out in the statute, plus reasonable attorney's fees, plus exemplary damages. In addition, Petitioners alleged breach of contract.

Subsequent to the filing of the complaint, Respondents requested and were granted an Order in the United States District Court, Southern District of

New York, on December 2, 1976, compelling arbitration in New York. On February 7, 1977, Petitioners moved in the United States District Court, Northern District of Texas, Dallas, to discover certain documents. This was followed by Respondents' Motion for a Protective Order until a decision was rendered on Defendants' Motion for Stay of Proceedings Pending Arbitration, which had been filed on November 24, 1976, in the same District Court. The Dallas District Court issued an Order staying all proceedings pending arbitration on April 14, 1977, and a slightly revised Order on April 21, 1977. Petitioner subsequently filed an appeal to the Fifth Circuit seeking a reversal of the District Court's ruling and a remand to continue with the judicial proceeding. Respondent's Motion to Dismiss the appeal was granted on September 1, 1977.

REASONS FOR GRANTING THE WRIT

1. *Conflict with other decisions.*

Consideration by this Court is necessary on the grounds that the holdings below conflict in substance with *Wilko v. Swan*, 346 U.S. 427 (1953), and were reached on the basis of the misapplication of *Prima Paint Corporation v. Flood and Conklin Mfg. Co.*, 388 U.S. 395 (1967), as being dispositive to the issue at bar.

In *Wilko* this Court held that the "no Waiver" provisions of the Securities Act took precedence over the arbitration agreement in the contract. The Court recognized that "the Securities Act was drafted with an eye to the disadvantages under which buyers

labor," and that a waiver of his right to sue in courts is a surrender of one of the advantages the Act gave him. *Id.* at 435.

The Texas Deceptive Trade Practices—Consumer Protection Act's stated purpose is also to protect a disadvantaged group, the consumers. Congress also has recognized consumers as disadvantaged by passing several laws whose purpose was their protection: Truth in Lending Act, 15 U.S.C.A., Sections 1601-1681 (1974), the Home Mortgage Disclosure Act, 12 U.S.C.A., Sections 2801-2809 (Supp. 1974), the Federal Trade Commission Act (Unfair Trade Practice), 15 U.S.C.A. 45 (a)(i) (Supp. 1977), and many more.

The Texas Act also contains an express "no waiver" provision such as that in *Wilko*, which was included to prevent the advantaged party from avoiding the effects of the Act. If the arbitration agreement is given effect in this case, the entire act will be avoided.

Although *Wilko* is distinguishable from the case at bar because it dealt with a Federal Statute rather than a State Statute, this Court has held that Federal Courts should enforce State created rights. *Bernhardt v. Polygraphic Company of America*, 350 U.S. 198 (1956). Furthermore, Congress has announced its public policy favoring consumers in several legislative enactments. See selected statutes listed, *supra*.

Prima Paint Corporation v. Flood and Conklin Mfg. Co., supra, which the Courts below based its decision

upon, was limited to the sole issue of whether a claim of fraud in the inducement of the entire contract is to be resolved by a Federal Court, or whether the matter is to be referred to arbitration. *Id* at 402. However, here the issue is whether State created rights, which are protected by "no waiver" provisions, may be waived by arbitration clauses.

There is no doubt that Texas Courts would disallow arbitration in order to protect the rights of its consumers as provided in the Deceptive Trade Practices—Consumer Protection Act, although due to the relative newness of the Act the matter has not been considered. It is clear that the Texas Legislature intended to protect consumers and did not intend to allow such rights to be contracted away. Thus, the Federal Court sitting in Texas should act as "only another Court of the State." *Bernhardt* at 203. "If the Federal Court allows arbitration where the State Court would disallow it, the outcome of litigation might depend on the courthouse where suit is brought. *Id* at 203.

Not only would a stay of proceedings substantially affect a cause of action created by the State of Texas, it would deprive Petitioners of their rights as citizens of Texas, and permit those shielded by an arbitration agreement to avoid liability to citizens of Texas for violation of Texas law. The issues raised by these conflicts are of continuing importance, and should be resolved by this Court.

2. *Impact on the consumer and his constitutional rights.*

The Federal Arbitration Act was never intended to,

and could not constitutionally, supersede State Substantive Law. In an article published by the American Bar Association's Committee on Commerce, Trade and Commercial Law, it was stated that "whether or not an arbitration agreement is to be enforced is a question of the law of procedure and is determined by the law of the jurisdiction wherein the remedy is sought." *The United States Arbitration Law and Its Application*, 11 A.B.A.J. 153, 154 (1925).

Here, Texas has preempted an area of commerce in which Congress has not acted. Petitioners, as residents of Texas, are entitled to the protection of the Texas Statute, especially when the Respondents made themselves subject to Texas law by their alleged conduct within the boundaries of the State.

Thus, the District Court should have applied Texas Substantive Law as required by *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). There is no claim that the Texas Act is unconstitutional or inapplicable to the controversy. This Court should not permit the Federal Arbitration Act to deprive these Petitioners of their rights under a Texas statute regulating conduct which was specifically reserved for the States under the Constitution. In doing so, State legislation enacted for consumer protection would be useless against anyone with an arbitration clause, which would put the consumer in a helpless situation rather than even the disadvantaged position he now occupies.

CONCLUSION

For the reasons stated, this Court should grant this Petition for a Writ of Certiorari, and the judgment of the Courts below should be reversed, with instructions for such further proceedings as may be necessary.

Respectfully submitted,

S/.....
H. C. McCracken
McCracken, Shields,
and Taylor, P.C.
Dallas County State
Bank Building
Carrollton, Texas 75006
(214) 242-7691
Attorney for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing Petition for Writ of Certiorari were sent to Lans, Feinberg & Cohen, 555 Madison Avenue, New York, New York 10022, and Mr. Martin Barenblat, 2001 Bryan Tower, Dallas, Texas 75201, by placing same in the United States mail, postage prepaid, this 22 day of November, 1977.

S/
H. C. McCracken

Supreme Court, U. S.
FILED
NOV 25 1977
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-817

DONALD L. BRISENDINE and JOHN BASS,
Petitioners,

v.

NATIONAL MOVIE-DINE, INC., et al.,
Respondents.

APPENDIX OF ORDERS AND DECREES TO SUPPLEMENT PETITION FOR WRIT OF CERTIORARI FILED ON NOV. 25, 1977.

H. C. McCRACKEN
McCRACKEN, SHIELDS & TAYLOR
A Professional Corporation
Dallas County State Bk. Bldg.
Carrollton, Texas 75006
Attorneys for Petitioners.

SOUTHWESTERN LAW PRESS – DALLAS, TEXAS 75208 – (214) 742-3600

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Docket No. 76 Civ. 4713 (R.J.W.)

In the Matter of the Arbitration between
National Movie-Dine, Inc.,
Petitioner,

and
Donald L. Brisendine and John Bass,
Respondents.

ORDER COMPELLING ARBITRATION

The petitioner National Movie-Dine, Inc. having filed a petition for an order, compelling arbitration of the controversies that have arisen between it and Donald L. Brisendine and John Bass, respondents, pursuant to the provisions of §4 of the United States Arbitration Act, 9 U.S.C. §4, and the petition having regularly come on to be heard at the motion term of this Court on November 23, 1976.

Now, upon reading and filing the notice of petition, dated October 26, 1976, the petition of National Movie-Dine, Inc., dated October 22, 1976, the affidavit of Vincent J. Bochis, sworn to October 26, 1976 and the exhibits attached thereto, including the written arbitration agreements (the "Agreements"), both dated April 4, 1976 and separately entered into by respondents with petitioner providing for a settlement by arbitration of any dispute arising thereunder, with proof of due service thereof, all submitted in support of the petition, and respondents having

defaulted in pleading or appearing thereon, and due deliberation having been had and the court being satisfied that neither the making of the written arbitration agreements nor the failure by respondents to comply therewith is in issue, and the court having rendered its decision,

Now, on motion of Lans Feinberg & Cohen, attorneys for the petitioner, it is

ORDERED that the petition be and the same hereby is, in all respects, granted, and it is further

ORDERED that respondents Donald L. Brisendine and John Bass, be and they hereby are directed to proceed to arbitration, in the City, County and State of New York, of the disputes set forth in the petition which are pending between petitioner and respondents and that said arbitration proceed in accordance with the rules of the American Arbitration Association as provided in paragraph 17 of the Agreements, and it is further

ORDERED that the disputes and controversies existing between petitioner and respondents be and the same are hereby consolidated into one arbitration proceeding under the title of "National Movie-Dine, Inc., claimant, against Donald L. Brisendine and John Bass, respondents."

Dated: New York, New York
December 2, 1976

/s/ Robert J. Wards
U.S. D.J.

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. 3-76-1329-G

DONALD L. BRISENDINE, et al.
Plaintiffs,

VS.

NATIONAL MOVIE-DINE, INC., et al.,
Defendants.

ORDER STAYING ALL PROCEEDINGS PENDING ARBITRATION

Defendants National Movie-Dine, Inc., Creative Cine-Tel, Inc., Ernest Bogen, and Lawrence H. Forray, who are all of the Defendants who have been served with process in this case (the "Defendants"), have moved the Court, pursuant to Section 3 of the United States Arbitration Act, 9 U.S.C. 3, and Rule 6(b) of the Federal Rules of Civil Procedure, for an Order staying all proceedings in this action and extending the time within which they must Answer or otherwise plead to the Complaint herein, until arbitration has been held regarding the alleged dispute upon which this action is based, in accordance with paragraph 17 of the Distributor Licensing Agreements executed between Defendant National Movie-Dine, Inc. and the respective Plaintiffs during April 1976 (the "Distributing Agreements"). Upon consideration of the pleadings, memoranda and Affidavits of the respective parties, and after hearing the argument of

counsel for the respective parties, it appears to the Court that:

1. The Distributor Licensing Agreements constitute "contract(s) evidencing a transaction involving commerce" within the meaning of Sections 1 and 2 of the United States Arbitration Act, 9 U.S.C. §§ 1 and 2;

2. The Distributor Licensing Agreements expressly provide for arbitration in paragraph 17 as follows:

> Any controversy, dispute, or question arising out of any aspect of the Agreement, including the making thereof, shall be resolved by arbitration in accordance with the then existing rules of the American Arbitration Association conducted in New York, New York . . .

3. The allegations of the Complaint in this action state a controversy and dispute arising out of the making of the Distributor Licensing Agreements and are subject to arbitration pursuant to paragraph 17 of the Distributor Licensing Agreements;

4. On December 2, 1976, the United States District Court for the Southern District of New York entered an Order pursuant to Section 4 of the United States Arbitration Act, 9 U.S.C. §4, compelling Plaintiffs to submit their alleged disputes with Defendants arising out of the Distributor Licensing Agreements to arbitration, in the City, County and State of New York, in accordance with paragraph 17 of the Distributor Licensing Agreements; and

5. Based on *Prima Paint Corp. v. Flood and Conklin Mfg. Co.*, 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d

1270 (1967), the entry of an Order staying all further proceedings in this action pending arbitration is now appropriate.

It is therefore, ORDERED that all proceedings in this action be and they are hereby stayed and the time for Defendant to Answer or otherwise plead to the Complaint herein be and it is hereby extended until arbitration has been held regarding the alleged disputes upon which this action is based in accordance with paragraph 17 of the Distributor Licensing Agreements.

Signed this 14th day of April, 1977.

/s/ Patrick Higginbotham
United States District Judge

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. 3-76-1329-G

DONALD L. BRISENDINE, et al.
Plaintiffs,

VS.

NATIONAL MOVIE-DINE, INC., et al.,
Defendants.

REVISED ORDER STAYING ALL PROCEEDINGS PENDING ARBITRATION

Defendants National Movie-Dine, Inc., Creative Cine-Tel, Inc., Ernest Bogen, and Lawrence H. Forray, who are all of the Defendants who have been served with process in this case (the "Defendants"), have moved the Court, pursuant to Section 3 of the United States Arbitration Act, 9 U.S.C. 3, and Rule 6(b) of the Federal Rules of Civil Procedure, for an Order staying all proceedings in this action and extending the time within which they must Answer or otherwise plead to the Complaint herein, until arbitration has been held regarding the alleged dispute upon which this action is based, in accordance with paragraph 17 of the Distributor Licensing Agreements executed between Defendant National Movie-Dine, Inc. and the respective Plaintiffs during April 1976 (the "Distributing Agreements"). Upon consideration of the pleadings, memoranda and Affidavits of the respective parties, and after hearing the argument of

counsel for the respective parties, it appears to the Court that:

1. The Distributor Licensing Agreements constitute "contract(s) evidencing a transaction involving commerce" within the meaning of Sections 1 and 2 of the United States Arbitration Act, 9 U.S.C. §§ 1 and 2;

2. The Distributor Licensing Agreements expressly provide for arbitration in paragraph 17 as follows:

> Any controversy, dispute, or question arising out of any aspect of the Agreement, including the making thereof, shall be resolved by arbitration in accordance with the then existing rules of the American Arbitration Association conducted in New York, New York . . .

3. The allegations of the Complaint in this action state a controversy and dispute arising out of the making of the Distributor Licensing Agreements and are subject to arbitration pursuant to paragraph 17 of the Distributor Licensing Agreements;

4. On December 2, 1976, the United States District Court for the Southern District of New York entered an Order pursuant to Section 4 of the United States Arbitration Act, 9 U.S.C. §4, compelling Plaintiffs to submit their alleged disputes with Defendants arising out of the Distributor Licensing Agreements to arbitration, in the City, County and State of New York, in accordance with paragraph 17 of the Distributor Licensing Agreements; and

5. Based on *Prima Paint Corp. v. Flood and Conklin Mfg. Co.*, 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d

1270 (1967), the entry of an Order staying all further proceedings in this action pending arbitration is now appropriate.

It is, therefore ORDERED that all proceedings in this action be and they are hereby stayed until the entry of an order confirming the arbitration award, and, should it be necessary, that the time to Answer or otherwise plead to the Complaint herein be and it is hereby extended until twenty days after service of notice of entry of the order confirming the arbitration award.

Signed this 20 day of April, 1977.

/s/ Patrick Higginbotham
United States District Judge

In The

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 77-2022

Donald L. Brisendine, and John Bass
Plaintiffs-Appellants,

versus

National Movie-Dine, Inc., et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas

---

Before THORNBERRY, RONEY and HILL, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellees' motion to dismiss the appeal is granted.

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing Appendix to Petition for Writ of Certiorari were sent to Lans, Feinberg & Cohen, 555 Madison Avenue, New York, New York 10022, and Mr. Martin Barenblat, 2001 Bryan Tower, Dallas, Texas 75201, by placing same in the United States mail, postage prepaid, this ..... day of December, 1977.

.....

H. C. McCracken

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

STEPHEN SAYRE SINGER
Lans Feinberg & Cohen
555 Madison Avenue
New York, New York 10022
Counsel for Respondents

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

Opinions Below

No opinion was rendered by either the Fifth Circuit or by the District Court for the Northern District of Texas, Dallas Division. No opinion was rendered by the District Court for the Southern District of New York, which made an order compelling arbitration in a collateral proceeding between the corporate respondent and petitioners. The orders of these courts are found in the petitioners' appendix.

Jurisdiction

The order of the Fifth Circuit, dismissing petitioners' appeal from an order of the Texas district court staying proceedings in favor of arbitration, was entered on September 1, 1977. Jurisdiction may be invoked under 28 U.S.C. § 1254(1).

Question Presented

Whether the Court of Appeals correctly dismissed petitioners' appeal from a district court order staying proceedings in favor of arbitration where a prior order of another district court had ordered arbitration of the subject matter and the order appealed from was not an interlocutory order granting an injunction within the meaning of 28 U.S.C. § 1292(a)(1).

Statutory Provision Involved

UNITED STATES CODE, Title 28:

§ 1292. Interlocutory decisions

(a) The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court; . . .

Statement of the Case

On October 4, 1976, petitioners Brisendine and Bass filed a diversity action in the District Court for the Northern District of Texas, Dallas Division, seeking rescission

of Distributor Licensing Agreements between each of them and respondent National Movie-Dine, Inc. The prayer also asked for incidental damages and statutory treble damages under Texas law.

In response, on October 22, 1976, National Movie-Dine, Inc. filed a petition in the District Court for the Southern District of New York asking for an order pursuant to 9 U.S.C. § 4 compelling the Texas plaintiffs (petitioners herein) to proceed to arbitration in conformity with the arbitration provision of the Distributor Licensing Agreements. In these Agreements the parties had broadly provided for arbitration in New York City, invoked the jurisdiction of the New York courts and specifically submitted themselves to their jurisdiction.

Petitioners were personally served in Texas. They failed to appear or answer, and, on December 2, 1976, the District Court for the Southern District of New York, noting their default, made and entered an order directing them to arbitrate their disputes with National Movie-Dine, Inc. in New York City. (A.1) Petitioners were served with notice of entry of this order by mail, on December 10, 1976. They never appealed from the December 2, 1976 order.

Meanwhile, on November 24, 1976, National Movie-Dine, Inc., Creative Cine-Tel, Inc., Ernest Bogen and Lawrence H. Forray, the only Texas defendants (respondents herein) who had been served with process, moved in the Texas action, inter alia, to stay those proceedings pending arbitration pursuant to 9 U.S.C. § 3 and for a consequent enlargement of their time to plead to the complaint pursuant to Rule 6(b) of the Federal Rules of Civil Procedure.

On April 21, 1977, the Texas district court, referring, amongst other things, to the December 2, 1976 order of the District Court for the Southern District of New York directing petitioners to proceed to arbitration, entered a revised

order staying the Texas action pending arbitration. (A.6) Petitioners thereafter appealed to the Fifth Circuit Court of Appeals.

They filed an appellate brief arguing the same position they take in their present petition to this Court. (In the district court, petitioners had not made any written submission in opposition to the respondents' stay application.) Respondents did not file an answer to this brief, but moved, instead, to dismiss the appeal on the grounds that the Court of Appeals did not have jurisdiction of the appeal under 28 U.S.C. § 1292(a)(1), and, that, in any event, the order of the District Court for the Southern District of New York was res judicata of the issues sought to be tendered on the appeal.

In their memorandum to the Court of Appeals, respondents argued that, as the petitioners' complaint in the District Court for the Northern District of Texas was equitable in nature, under the so-called *Enelow-Ettelson* rule [*Enelow* v. *New York Life Insurance Co.*, 293 U.S. 379 (1935); *Ettelson* v. *Metropolitan Life Insurance Co.*, 317 U.S. 188 (1942)], as viewed in the light of *City of Morgantown, W. Va.* v. *Royal Insurance Co.*, 337 U.S. 254 (1949), and *Baltimore Contractors* v. *Bodinger*, 348 U.S. 176 (1955), the Texas order was not appealable as an order granting an injunction under 28 U.S.C. § 1292(a)(1). *See* 9 Moore's *Federal Practice*, ¶¶ 110.20[3], [4.-1] at 240-49.

The settled status of the *Enelow-Ettelson* rule and the Fifth Circuit's adherence to it was drawn to that Court's attention by respondents' citation of its decision in *Cobb* v. *Lewis*, 488 F.2d 41, 46 (1974), and its applicability to an equity suit seeking incidental legal relief as well, by citation of its decision in *Thompson* v. *House of Nine, Inc.*, 482 F.2d 888 (1973).

The res judicata effect of the unappealed order of the United States District Court for the Southern District of

New York, which had been noted in the orders of the Texas district court (A.4,7) was emphasized to the Court of Appeals by citation of *Angel* v. *Bullington*, 330 U.S. 183 (1947).

Petitioners did not file any opposition to the respondents' motion to dismiss their appeal. By order entered September 1, 1977 (A.9), and thereupon issued as its mandate, the Fifth Circuit Court of Appeals granted the motion to dismiss without comment.

Argument

Review is plainly unwarranted in this case.

In the first instance, it is precluded by the long established principle that this Court will not review on certiorari "a decree of the Circuit Court of Appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Construction Co.* v. *Jacksonville, T. & K.R. Co.*, 148 U.S. 372, 384 (1893); *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U.S. 251, 258 (1916). Having to proceed with arbitration is not such a circumstance. *See* 9 Moore's *Federal Practice* ¶ 110.20[4.-1](3), at 249.

Moreover, petitioners, by the direction of their arguments, are actually asking this Court to review the stay order of the Texas district court rather than that of the Fifth Circuit refusing to hear their appeal from the stay order. The issues resolved by the two orders are entirely separate, and, in the case of the district court order, they were not presented to or considered by the Fifth Circuit on the motion to dismiss. This Court will rarely, if ever, review matters not presented to the court below, *Neely* v. *Martin K. Eby Construction Co.*, 386 U.S. 317, 330 (1967), or fully considered by it, because they are "not ripe for review." *Brotherhood of Locomotive Firemen and Enginemen* v. *Bangor & Aroostook Railroad Co.*, 389 U.S. 327 (1967).

Intrinsically, there is nothing about the Fifth Circuit's order which merits review. It does not present an opportunity for reconsideration of the *Enelow-Ettelson* line of cases, which permit appeals to the courts of appeals from stay orders in law type actions. *See* 9 Moore's *Federal Practice* ¶ 110.20[3], at 245. It does, however, follow the holding of *Baltimore Contractors* v. *Bodinger,* 348 U.S. 176 (1955), which teaches that such orders have never been appealable in our system and have not been made so by any enacted modifications to the final judgment rule. Accordingly, as the Court has emphasized in *Baltimore Contractors,* it is for the Congress to determine if any change in favor of allowing interlocutory appeals in cases such as this is desirable. Within the area left to judicial determination, the weight of authority is against expansion of jurisdiction over interlocutory appeals. *Id.* at 185. This is especially so where, as here, the order petitioners sought to appeal is one permitting arbitration to go forward. *Cf. Stateside Machinery Co., Ltd.* v. *Alperin,* 526 F.2d 480 (3rd Cir. 1975); *New England Power Co.* v. *Asiatic Petroleum Corp.,* 456 F.2d 183 (1st Cir. 1972). *See* 9 Moore's *Federal Practice* ¶ 110.20[4.-1](3), at 249.

Conclusion

For the foregoing reasons the petition for certiorari should be denied.

Respectfully submitted,

STEPHEN SAYRE SINGER
Counsel for Respondents

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